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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 653

WILLIAM MEYERS, STANDARD BRANDS INCORPORATED, ATLANTIC GUMMED PAPER CORP. and WARSHAW MANUFACTURING, INC.,

Petitioners,

vs.

FAMOUS REALTY, INC. and MOSES SPATT and JOSEPH S. WOHL, individually and as Director-Trustees in Dissolution thereof,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners William Meyers, Standard Brands Incorporated, Atlantic Gummed Paper Corp. and Warshaw Manufacturing, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on October 27, 1959.

Citation to Opinions Below

The opinion of the Court of Appeals printed in Appendix A hereto, *infra*, page 13, is reported in 271 F. 2d 811. The opinion of the District Court printed in Appendix B hereto, *infra*, page 24, is reported in 178 F. Supp. 472.

Jurisdiction

The judgment of the Court of Appeals was entered on October 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

Where

(a), until 1941 and for many years prior thereto two partnerships conducted an interstate common carrier operation consisting of carfloat-harbor operations, transporting of cars over tracks between the harbor pierheads and a freight station in Brooklyn, New York, said tracks and station being on land owned by them, and operation of said freight station;

(b) until 1941 another railroad (hereinafter called the lessee) operated a purely local (non-interstate) switching service receiving cars from such freight station and delivering them to nearby industrial plants or vice versa, such local operation being conducted over tracks leased in part from the two partnerships and in part from the City of New York;

(c) in 1941 the lessee received Interstate Commerce Commission authorization to lease (in addition to the properties already leased from the two partnerships) the partnerships' properties used in the above-mentioned interstate common carrier operation and thereafter to conduct both its former operation and the partnerships' former operation as one combined operation;

(d) beginning in 1941 the lessee conducted such combined operation;

(e) in 1945 the two partnerships transferred their interests as lessors to the respondents;

(f) in 1959 the lessee abandoned its entire operation after receiving permission to do so from the Interstate Commerce Commission;

are respondents (the lessors at the time of abandonment) obligated to resume conducting at least that portion of the lessee's operation which was conducted prior to 1941 by their grantors (the two partnerships), unless and until respondents themselves receive Interstate Commerce Commission permission to abandon?

Statutes Involved

Printed in Appendix C hereto, *infra*, p. 28, are Section 1(18) of the Interstate Commerce Act [49 U.S.C. § 1(18), 24 Stat. 379, as amended in 40 Stat. 101, 49 Stat. 543 and 54 Stat. 901] and Section 1(20) of the Interstate Commerce Act [49 U.S.C. § 1(20), 24 Stat. 379, as amended in 40 Stat. 101 and 41 Stat. 478.

Statement

Petitioners, invoking its jurisdiction under Section 1(20) of the Interstate Commerce Act, filed complaint in the United States District Court for the Eastern District of New York seeking a mandatory injunction requiring respondents (hereinafter sometimes called the "lessors") to carry on the interstate operations of the Jay Street Connecting Railroad (hereinafter sometimes called the "lessee") unless and until the lessors are themselves authorized by an order of the Interstate Commerce Commission to abandon such operations, or unless and until they lease to petitioner William Meyers the property they theretofore leased to lessee. The petitioners moved for a preliminary injunction and the respondents, at the same time and place, moved to dismiss the complaint pursuant to Rule 12(b) of the Rules of Civil Procedure. The Dis-

trict Court entered an order dismissing the complaint and by consequence denied the preliminary injunction. The Court of Appeals affirmed.

The complaint alleges that: the lessee carried on an interstate railroad business beginning in 1941 pursuant to a certificate granted by the Commission in proceedings reported in 214 I.C.C. 43; during such operation two partnerships (Jay Street Terminal and Arbuckle Brothers), which held all of the stock of the lessee, leased to the lessee all of the land it used for its operation, other than land lying in the streets of the City of New York; from 1916 to 1941, the two partnerships themselves had carried on the interstate railroad business conducted after that date by the lessee; in 1945 respondent Famous Realty, Inc., of which respondents Spatt and Wohl were the sole stockholders, acquired all of the stock of the lessee and all of the land theretofore leased to the lessee by said partnerships; Famous Realty, Inc. continued to lease said land to the lessee as successor of the partnerships; Famous Realty, Inc. was dissolved in 1958 and respondents Spatt and Wohl are the sole distributees in dissolution thereof; the respondents are and since such dissolution have been the sole stockholders of the lessee and the lessors of the property heretofore leased to the lessee by the partnerships; by order dated April 13, 1959, as amended by order dated May 26, 1959, the Interstate Commerce Commission issued a certificate authorizing the lessee [applicant] to abandon subject to the following condition:

> "The applicant shall sell to any responsible person, firm, or corporation, offering within thirty days from the date of service hereof to purchase the same for continued operation of the railroad line here involved or any portion thereof, any or all of its property necessary or useful to such continued operation, including the applicant's right and interest as lessee or tenant in respect of any such property and facilities used or useful in the operation of its line of

railroad, at a price not less than the net salvage value of the properties and interests sought to be acquired, it being intended by this condition that the purchaser of the physical properties shall be substituted for and occupy the same status as the applicant now does with respect to said leasehold interests";

petitioner William Meyers thereupon offered to purchase in compliance with said condition; the lessee's reply was that it had "no assignable rights or interests as lessee or tenant" and it claimed it had nothing to transfer but its operating equipment; on review of the Commission's determination by a three-judge statutory court, in an action in which respondents herein intervened, said court affirmed the determination of the Commission but specifically declined to determine whether the lessors were independently subject to a duty to lease or sell to a prospective purchaser under the condition (174 F. Supp. 609); during said court action, respondents indicated that they were unwilling to lease to a purchaser under the aforesaid condition except on unreasonable terms; on June 29, 1959, the lessee ceased all operations and the respondents have taken no steps to continue them; and by virtue of their position as lessors respondents are under a duty to continue the operation unless and until they receive a certificate from the Commission authorizing them to abandon.

In addition to the allegations of the complaint certain facts regarding the nature of operations conducted by lessors' grantors prior to 1941 are found in the Commission's decision (244 I.C.C. 43) authorizing such grantors to enter into the 1941 lease with the lessee. This decision is referred to in the complaint and the Court of Appeals has relied on facts contained therein in reaching its decision herein. Presumably these facts would normally be developed at the trial along with other evidence relating to the nature of such operations. These facts are: prior to 1941 the two partnerships above mentioned conducted all of the interstate business thereafter carried on by the

lessee, consisting of (1) car float and lighterage harbor operations; (2) transporting of cars over tracks between the harbor pierheads and a freight station in Brooklyn, N. Y., said tracks and station being on land owned by them; and (3) operation of the freight station; at the same time the lessee performed merely a local (non-interstate) service over tracks leased in part from New York City and in part from the two partnerships; such service consisted of switching cars between the above-mentioned partnerships' freight station and nearby industrial plants. Whether such service was performed by the lessee for its own account or for the account of the two partnerships does not appear in the Commission's 1941 decision and evidence with respect thereto would have to be developed at the trial. The Commission's 1941 decision permitted the partnerships to lease to the lessee all of the properties over which said partnerships theretofore operated their interstate common carrier business. This resulted in combining the prior interstate business of the two partnerships and the local non-interstate business of the lessee into a combined operation conducted by the lessee.

Reasons for Granting the Writ

These reasons are twofold.

1. The decision of the Court of Appeals below conflicts directly with a principle which is well established in the administration of the Interstate Commerce Act, *Hoboken Railroad, Warehouse and S. S. Connecting Co. Operation*, 257 I.C.C. 739, 744 (1944) and *Livestock Service Terminal Company Abandonment of Operation*, 257 I.C.C. 1, 7 (1944), and which was approved by this court in *Smith* v. *Hoboken R. Co.*, 328 U. S. 123 (1946) and *Thompson* v. *Texas, Mexican R. Co.*, 328 U. S. 134 (1946). The principle is that where a carrier leases property theretofore operated by it to a lessee which thereafter performs such operation, upon abandonment by the lessee the lessor becomes obli-

gated to resume its prior operation, and an Interstate Commerce Commission certificate approving the lessee's abandonment does not terminate the obligation unless and until the lessor applies for and receives its own certificate permitting abandonment.*

Conforming to the recited principle, when carrier operations are conducted by subsidiaries over lines leased from parents, the parent-lessors regularly follow the practice of joining with the lessee in applications seeking permission to abandon.

The decision of the Court below runs directly afoul of the recited principle. No fact adequately distinguishes the instant case from those where the principle has been applied. Rather, facts claimed to distinguish the instant case demand its application for the same reasons which invoked its enunciation in the cases cited and because they would permit its easy avoidance. These facts are: (1) the present lessors are the grantees, with knowledge, of the carrier which originally conducted the operation and leased to the lessee; (2) the interstate operation conducted by lessors' grantor prior to leasing may have been less than the total operation thereafter conducted by the lessee, the grantor's

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* *In Hoboken Railroad, Warehouse and S.S. Connecting Operation*, 257 I.C.C. 739 the Commission stated:

> "The sense of our decisions, as well as those of the courts, seems to be that a lessor company by operation of law immediately, and without respect to its own desires in the matter, becomes responsible for the operation of railroad properties owned by it upon the termination of a lease thereof. No certificate from us is needed because the lessor's obligations and duties to the public have never ceased but have merely been performed by the lessee for its benefit, and when the latter for any reason no longer can perform such obligations, the duties must be performed by the lessor on its own behalf. Were this not so, when a long-term lease expires the lessor might contend that having withdrawn as an operating carrier in interstate commerce it had no responsibility for any further operation of the properties, and if it were required to obtain a certificate before resuming operation might decline to make application therefor and avoid any efforts to force it to resume operation on the ground that it was not required to do so unless it obtained a certificate."

prior operation having been combined by the lessee with a local (intrastate) operation already being conducted by said lessee (it being unknown on the present state of the record whether such intrastate operation was conducted for the lessee's own account or for the grantor's account.)

The first of these facts cannot distinguish the instant case because a grantee with knowledge obviously can stand in no better position than its grantor. Otherwise, the recited principle could be avoided by the original lessor's simple transfer to a grantee. The Court of Appeals seems to have recognized this and seems to have relied on the second fact. But distinguishing this case on such basis would mean excusing the lessor from the obligation to resume conducting the prior operation merely because the lessee combined that operation with a local (non-interstate) operation. To state the proposition is to indicate its unacceptability. It may be that the lessors cannot be obligated to conduct any part of the local (non-interstate) operation not shown to have been conducted for their grantor's account prior to the leasing. That is a determination which would have to await the trial. Irrespective of that determination, however, there can be no valid reason for not requiring the lessors to resume the conduct of interstate operation which was conducted by such grantor prior to 1941. If that operation is resumed, the local handling of shipments between the grantor's freight station and the neighboring industrial plants can be effected in many ways which should not be the concern of the courts in this case.

The Court below mentions, as an additional factor allegedly distinguishing the instant case, the Commission's approval of the grantor's original lease to the lessee. But this is not a distinguishing factor. It is one which was present in each of the cases where the recited principle has been applied. Indeed no lessee operation pursuant to any such lease is possible without Commission approval. Section 5(2) of the Interestate Commerce Act [49 U.S.C.

5(2)]. If Commission approval of the lease were to result in the lessors' loss of "all status as carriers by railroad," the obligation imposed by the principle would never have arisen in any of the cited cases. In addition, any contention that Commission approval results in such loss is directly contrary to the decision in *Livestock Terminal Company Abandonment of Operation*, 257 I.C.C. 1, 7 (1944), *supra*, which held that even approval of the lease with specific language by the Commission that the lessor is henceforth "divested of common carrier status" did not free the lessor from the obligation to resume operations imposed by the recited principle.*

2. The problem presented herein is of importance in the administration of the Interstate Commerce Act. It is well known that a large part of the railroad transportation in the United States is carried on over leased lines. *Cf. Smith v. Hoboken R. Co.*, 328 U. S. 123, 131-132 (1946).

Under the decision below, a Commission finding that the lessee's circumstances should permit it to abandon will result in the lessor being freed of all further obligations without any consideration being given to the lessor's circumstances, in all cases where there has been a combination of the leased operation with some local operation. Unless this decision is reversed, the large number of existing combinations of this type and the ease of combining a

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*In said case the Commission stated:

> "* * * The Stockyards Company did not begin operation of loading and unloading service under a certificate of public convenience and necessity. Its operation began long prior to the enactment of section 1(18-20) of the act. But, in the performance of the service for many years, it incurred the relationship and duty to the public of a common carrier by railroad subject to the act. This relationship is not terminated by a lease of carrier facilities to another for performance of the service and, if the lease is terminated, the lessor itself must resume operation and perform its duty to the public until legally relieved from that obligation. * * *."

leased operation with a local operation in the future will necessarily make its effects widespread.

Clearly, the Commission may approve a lease and operation pursuant thereto by a lessee for many reasons unrelated to the complete termination of a lessor's responsibility. Therefore, were subsequent permission to abandon obtained by the lessee automatically to include similar permission for the lessor, the lessor would be abandoning without the Commission ever having specifically considered the lessor's situation. Yet it is obvious that reasons for permitting the lessor to abandon do not necessarily coincide with reasons for permitting lessee to abandon. Facts pertaining to a lessor would obviously not be relevant in a proceeding in which the lessor is not a party.

The importance of the instant problem in the administration of the Interstate Commerce Act is evident for another reason. Section 1(20) of the Act [49 U.S.C. § 1(20)] provides that in issuing a certificate permitting abandonment the Commission may attach "such terms and conditions as in its judgment the public convenience and necessity may require." A very frequent condition attached by the Commission is to permit abandonment subject to the obligation of the carrier to sell, for purposes of continued operation, to a responsible bidder who agrees to pay at least the salvage value of the carrier's property. Cherington, The Regulation of Railroad Abandonments, p. 172 (1948). Unless a lessor has the obligation imposed by the recited principle, a ready method is offered for defeating the imposition of this type of sale condition in cases of leased operations.

Thus, in the instant, in permitting the lessee to abandon the Commission imposed the condition quoted *supra* (pp. 4-5), the obvious purpose of which was to permit continued operation by the purchaser as a new lessee in place of the abandoning lessee. One of the petitioners herein made an offer in compliance with the condition. However, the condition has proved meaningless because the abandon-

ing lessee owned neither the land on which its tracks were located nor the materials out of which they were constructed. The lessee claimed it had no lease rights to transfer and that it had nothing to sell except a few pieces of equipment. The purchase of said equipment was not essential to continue operation since similar equipment could be purchased or leased elsewhere.* What was essential to continue operation (as it would be in all cases) was the availability of the tracks and land. But the lessors refused to make them available to the prospective purchaser except on unreasonable terms.

If the recited principle is applicable and the lessor must apply for its own permission to abandon, on such application the Commission can impose a condition that the lessor lease or sell its property to a prospective purchaser on such terms as it finds to be reasonable. Unless such principle is applicable, the sale condition so frequently imposed by the Commission in the public interest will be entirely ineffective in all leased operations where there has been a combination of the lessor's prior operation with a local operation. Though specifically requested to do so, neither the District Court nor the Court of Appeals has pointed out any other procedure for making such condition effective, and it is clear that there is none.**

Any likelihood that on lessor's application the Commission would immediately grant it permission to aban-

* While the abandonment proceedings were pending the lessee sold the major part of its equipment, such as its tug and car float, and continued operation by leasing such equipment.

** The complaint prays that the injunction to resume operating endure until the lessors obtain permission to abandon or alternatively until they lease to the prospective purchaser under the above quoted condition. The Court below views this alternative prayer as making the complaint one for the enforcement of the Commission's condition. This is not so. The alternative prayer is simply recognition that the obligation imposed upon the lessor by the recited principle can be fulfilled by leasing to one who would carry on the operation with Commission's approval.

don as it did to the lessee would be an equitable circumstance which might justify a stay by the trial court, in the exercise of sound discretion, of the injunction pending the Commission's consideration of lessor's application made to it within a reasonable time, or might possibly even justify denial of the injunction on condition that such application be made. But such fact cannot justify dismissal of the complaint. Dismissal based on such fact involves the exercise of a function peculiarly for the Commission. Furthermore, it overlooks the extreme unlikelihood that, in view of the above quoted condition imposed in granting the lessee permission to abandon, the Commission would fail to impose a similar condition upon the lessor.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD SWAN BUELL,
Counsel for Petitioners.

BUELL, CLIFTON & TURNER,
ANDREW M. CALAMARI,
Of Counsel.

APPENDIX "A"

Opinion of the United States Court of Appeals, for the Second Circuit

No. 356—October Term, 1958.

(Argued September 9, 1959 Decided October 27, 1959.)

Docket No. 25851

WILLIAM MEYERS, STANDARD BRANDS INCORPORATED, ATLANTIC GUMMED PAPER CORP. and WARSHAW MANUFACTURING, INC.,

Plaintiffs-Appellants,

—v.—

FAMOUS REALTY INC. and MOSES SPATT and JOSEPH S. WOHL, individually and as director-trustees in dissolution thereof,

Defendants-Appellees.

Before:

CLARK, *Chief Judge,*

HINCKS and LUMBARD, *Circuit Judges.*

In a suit in the United States District Court for the Eastern District of New York under 49 U. S. C. A. § 1(20) for an injunction enjoining abandonment of a railroad line, from an order by Zavatt, *District Judge,* denying plaintiffs' motion for a preliminary injunction and granting the defendants' motion to dismiss, the plaintiffs appeal. *Affirmed.*

Appendix "A"

RICHARD SWAN BUELL, New York, N. Y. (McLanahan, Merritt & Ingraham, and Andrew M. Calamari, New York, N. Y., on the brief), *for plaintiffs-appellants.*

WHITNEY NORTH SEYMOUR, New York, N. Y. (Simpson, Thacher & Bartlett, Richard Hawkins and Taylor R. Briggs, New York, N. Y., on the brief), *for defendants-appellees.*

HINCKS, *Circuit Judge:*

The plaintiffs sought to charge the defendants, lessors of certain realty and tracks used by the Jay Street Connecting Railroad in its operations, with the duty of operating that railroad's line (which the I. C. C. has authorized the Railroad, as lessee, to abandon on condition)[1] until the defendants are also authorized to abandon or until they lease the property to the plaintiffs. The action was brought

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[1] The condition which was added to the original order by an amended order of May 26, 1959 was as follows:

"The applicant shall sell to any responsible person, firm, or corporation, offering within thirty days from the date of service hereof to purchase the same for continued operation of the railroad line here involved or any portion thereof, any or all of its property necessary or useful to such continued operation, including the applicant's right and interest as lessee or tenant in respect of any such property and facilities used or useful in the operation of its line of railroad, at a price not less than the net salvage value of the properties and interests sought to be acquired, it being intended by this condition that the purchaser of the physical properties shall be substituted for and occupy the same status as the applicant now does with respect to said leasehold interests."

under 49 U. S. C. A. § 1(18) and (20).[2] The court below granted the defendants' motion to dismiss, a ruling which, for the reasons hereinafter stated, we think correct.

It is not necessary for purposes of this decision to review at length the detailed historical facts surrounding the ownership and operations of the Jay Street Connecting Railroad (hereinafter referred to as "Jay Street"). See *Jay Street Connecting Railroad Acquisition*, 244 I. C. C. 43; *Meyers* v. *Jay Street Connecting Railroad*, 2 Cir., 259 F. 2d 532; 262 F. 2d 676; *Jay Street Connecting Railroad Abandonment*, Finance Docket No. 20240, decided April 13, 1959, 307 I. C. C. 137; *Jay Street Connecting Railroad* v. *United States*, D. C. E. D. N. Y., 174 F. Supp. 609; *Meyers* v. *Famous Realty, Inc.*, D. C. E. D. N. Y., July 10, 1959, —— F. Supp. ——. Instead we reiterate merely those facts

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[2] 49 U. S. C. A. § 1

"(18) * * * [N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment;

* * * * * *

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment and public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest;"

alleged by the plaintiffs which show the relationship of these defendants and their predecessors in title to the Jay Street Connecting Railroad and those findings contained in the above opinions with respect to the current ownership of the Jay Street's properties.

Jay Street performed an interstate harbor-terminal traffic interchange service from 1941 until April 1959, at which time the Interstate Commerce Commission ("Commission") approved the abandonment of its entire line of railroad and all of its carfloat and lighterage routes. For twenty-five years prior to 1941 Jay Street had merely performed a switching service involved in the harbor-terminal operations. In performing this service Jay Street had used its own equipment but had leased tracks from two lessors; the greater amount of main line and some other trackage was leased from the City of New York while a considerable amount of spur and some other trackage was leased from two partnerships, Jay Street Terminal and Arbuckle Brothers. These two partnerships had, prior to 1941, owned and operated a freight yard and the station thereon which it used in carrying on the marine activities constituting part of the harbor-terminal services involved herein. In *Jay Street Connecting Railroad Acquisition, supra*, the Commission approved Jay Street's purchase of all the partnerships' marine equipment, which included two towboats, a few carfloats, and several wooden barges. The Commission also approved a ten year lease to Jay Street of all the partnerships' real property, tracks, and freight house and yard facilities then used in the harbor-terminal operations, with a right reserved in the lessors to repurchase all of the leased equipment on default in the lease. The Commission reasoned that "the lines operated by the applicant and the freight house are natural component parts of one system of transportation," and concluded that the public interest would be served by allowing the two enterprises "to com-

bine their transportation activities in a duly organized railroad corporation." 244 I. C. C. 43. The effect of this order on the carrier status of the partnerships will be discussed later.

In 1945, Famous Realty, Inc., not only acquired all the stock of Jay Street but it also purchased the fee to the land, buildings and tracks theretofore leased to Jay Street by the two partnerships. The defendants herein, Spatt and Wohl, are the sole distributees of the properties of Famous Realty, Inc., and thus stand in the shoes of the lessors of part of the properties heretofore used by Jay Street in its operations.

The plaintiffs argue that their right to relief is clear, citing *Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134; *Livestock Service Terminal Company*, 257 I. C. C. 1; *Hoboken Railroad*, 257 I. C. C. 739. It is clear to us, however, that those cases hold, at most, that once a party acquires, through the continuous performance of carrier services for the public, the status of a "carrier by railroad," thus subjecting itself to the provisions of the Act and more particularly to § 1(18) and (20), it cannot absolutely terminate such status and the duties thereof by leasing its railroad facilities to another; once the lease is terminated or the lessee obtains permission to abandon its operations, the lessor is under a revived obligation to operate its railroad properties until it too receives an abandonment order from the Commission.

To be subject to the provisions of § 1(18) and (20) a party must have acquired the status of a *carrier by railroad* and it must be attempting to abandon all or some portion of a line of railroad *owned* or *operated* by it or, as we will assume for purposes of this case, by its predecessor in title. None of the decisions cited hold or imply that a non-carrier, by merely leasing its properties to a carrier, becomes a "carrier by railroad," thus subjecting itself to an obligation to carry on the operations of its lessee's railroad when said

lessee has been granted an abandonment order. We hold that a carrier which leases mere trackage rights to another carrier is under no obligation to carry on that other carrier's operations when its lease expires or that other carrier's operations are legally abandoned. See *Thompson* v. *Texas Mexican R. Co., supra*; *Cent. N. Eng. R. Co.* v. *B. & A. R. Co.*, 279 U. S. 415. For in such a case the lessor-carrier is not a carrier by railroad *with respect to the services performed by its lessee.* See *Escanaba & L. S. R. Co.* v. *United States*, 303 U. S. 315, 321. Thus we overrule without further comment the plaintiffs' contention that the defendants are under a duty to operate Jay Street's railroad line by virtue of the fact that their predecessors in title leased to Jay Street a part of the real property, tracks, and buildings used by it in its operations. As the defendants point out, a contrary holding would lead to the absurd conclusion that one renting a patch of cornfield to a railroad would come under an obligation to operate that railroad if it obtained permission to abandon the operation of its line.

A more reasonable proposition of law advanced by the plaintiffs, and one which would merit serious consideration if properly raised by the circumstances of this case, is that a carrier-lessor's grantees with notice are under an obligation to operate its carrier-properties when they revert to it under the terms of the lease or on the legal abandonment of operations by the lessee. It would not at all be unreasonable to hold, especially in these days when railroad operations are so often in the red, that a carrier-lessor cannot escape the burden of a potential obligation to operate, by the simple device of deeding its reversion in railroad properties to another; that the status of "carrier by railroad" and the duties therein involved attach to the grantees of a carrier's railroad properties.

But our decision must rest on the facts of this case. And the fact is that before as well as after the Jay Street Acqui-

sition proceedings all transportation of freight by rail had been carried on by Jay Street with its wholly owned motive equipment and that neither at the time of the acquisition nor long prior thereto had the two partnerships, which were the defendants' predecessors in title to the real estate, owned or operated an integrated railroad property independent of Jay Street. Indeed, the partnerships had done no more than to contribute to an integrated transportation service the operation of their marine facilities and the use of their real estate in connection with the switching service and rail transportation conducted by Jay Street. And in the Jay Street Acquisition proceedings the Commission approved the outright sale of the marine facilities of the two partnerships and the transfer of all their transportation activities to Jay Street, finding it to be in the public interest that they should thereby be combined "in a duly organized railroad corporation." We hold that upon the Jay Street Acquisition, which with respect to their transportation activities left the partnerships with nothing but a reversion in the leasehold interest in the freight yard and some tracks, the partnerships lost all status as carriers by railroad. *Glens Falls Portland Cement Co.* v. *Delaware & Hudson Co.*, 2 Cir., 66 F. 2d 490, cert. denied 290 U. S. 697. Thereafter, the sole duty to operate the transferred facilities and services rested with Jay Street, which has now been authorized not only to abandon the operation of its line but unconditionally to sell its facilities after thirty days.[3]

As noted below, perhaps it could reasonably be argued that, regardless of the terms of any lease, or the total absence thereof, under the terms of the Jay Street Acquisition order the defendants' predecessors, and indeed the defendants themselves, held the lands and tracks leased to Jay Street under the ten year lease subject to a power in the

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[3] See fn. 1, *supra*

Commission to impose a continuing obligation to lease these properties on reasonable terms to Jay Street or to any other responsible carrier who would undertake to perform the harbor-terminal services including the marine activities connected therewith. We think it quite contrary to both the terms of the Act and reason itself to hold that these defendants are under a duty to operate this entire line because they or their predecessors have leased realty and tracks to a carrier whose line has been legally abandoned. Especially is this so when the line is composed of facilities which these defendants and their predecessors either have never owned or operated and facilities which they have, with Commission approval, sold outright to a carrier who undertook the sole responsibility for their operations.

The plaintiffs, perhaps recognizing the futility of an attempt to prevent authorization of abandonment in any Commission proceedings brought by the defendants for that purpose,[4] assert that their real motive in seeking to compel such proceedings is to provide an opportunity for the Commission, if it will not require the defendants to operate the line, at least to impose a condition of lease or sale in its abandonment order. But obviously, regardless of the plaintiffs' motive, § 1(20) applies only to those having carrier status who are under a duty to operate. If the Commission should find that the defendants for lack of carrier status are under no duty to operate the line, it would have no jurisdiction under § 1(20) for any purpose. In that situation, surely it could not attach substantive conditions to its order dismissing for lack of jurisdiction.

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[4] In the Jay Street Connecting Railroad Abandonment proceedings the Commission stated that, "the same conclusions on the facts and law would justify our permitting the physical abandonment of the line herein by the lessor of the railroad properties, if such lessor were subject to our jurisdiction and therefore was obligated to continue the lessee's carrier operations, unless legally relieved of that requirement."

Appendix "A"

The plaintiffs in the Jay Street Abandonment proceedings argued that the Commission, though lacking jurisdiction over the persons of the defendants had sufficient jurisdiction over their real estate to impose upon it conditions of lease or sale. And they argue now before us that the condition in the abandonment order in those proceedings attached to the real estate and so was applicable to these defendants. Accordingly, they pray in the alternative that we enjoin the defendants from abandoning the line until they comply with the Jay Street Abandonment order by leasing their property to the plaintiffs.

The pertinent provision of the Commission's abandonment order[5] is as follows:

> "* * * it being intended by this condition that the purchasers of the physical properties shall be substituted for and occupy the same *status* [emphasis added] as the applicant now does with respect to said leasehold interests."

If the question were properly before us, we should interpret this provision to mean at most that irrespective of the provisions of the lease, if some purchaser of Jay Street's railroad properties had desired to continue that line's operation, the defendants could not have denied such purchaser the use of their lands or tracks without the permission of the Commission. Only under such an interpretation would the purchaser occupy the same *status* as Jay Street with respect to the leasehold interests. See *Jay Street Connecting Railroad Acquisition, supra; Smith* v. *Hoboken R. Co., supra; Thompson* v. *Texas Mexican R. Co., supra.*

However that may be, we hold that the question is not one which may be raised in this suit. This is so, we think, not because the plaintiffs are estopped by the Jay Street

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[5] See fn. 1, *supra.*

Appendix "A"

Abandonment proceedings from bringing a §1(20) action to prevent unauthorized abandonment by the defendants.[6] Rather, we base our holding on the proposition that any questions with respect to the extent to which the Commission did or could impose binding conditions on the defendants in the Jay Street Abandonment order[7] are foreclosed by the three-judge district court's review of that order. That court, with these parties before it, held that the Commission's order did not purport to bind the defendants. 174 F. Supp. 609. The plaintiffs are estopped from once again contending that the order imposed conditions of lease or sale on these defendants. Moreover, any contention in this injunction suit that the Commission erred in not imposing such conditions in the Jay Street Abandonment order is an improper collateral attack on the Commission order. *Village of Mantorville* v. *Chicago Great Western R. Co.*, D. C. D. Minn. 8 F. Supp. 791, an order which could be attacked only in the three-judge district court proceedings. 28 U. S. C. A. § 2325; *Lambert Co.* v. *Balt. & Ohio R.R. Co.*, 258 U. S. 377; *Venner* v. *Mich. Cent. R.R. Co.*, 271 U. S. 127; *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 486.

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[6] It is true that the Commission, when these defendants were not before it, indicated the belief that it had no jurisdiction over them, and that they were under no duty to operate the line even in the absence of an abandonment order. But this comment could in no way estop the plaintiffs from bringing action under §1(20); it is clear that the United States district court is the only forum having jurisdiction to prevent an illegal abandonment begun without the institution by the carrier of a §1(20) proceeding before the Commission. *Texas & Pac. R. Co.* v. *Gulf, C., & S. F. R. Co.*, 270 U. S. 266, 273; *Powell* v. *United States*, 300 U. S. 276; cf. *Thompson* v. *Texas Mexican R. Co.*, *supra*.

[7] See *Interstate Commerce Commission et al.* v. *Railway Labor Executive Assn.*, 315 U. S. 373; *Smith* v. *Hoboken R. Co.*, *supra*; *Thompson* v. *Texas Mexican R. Co.*, *supra*; *Central N. Eng. R. Co.* v. *B. & A. R. Co.*, *supra*; *Gulf, Mobile and Ohio R. Co.* v. *Illinois Central R. Co.*, 5 Cir., 225 F. 2d 816; *Village of Mantorville* v. *Chicago Great Western R. Co.*, *supra*.

Appendix "A"

The three-judge district court left open the question whether, notwithstanding the fact that the Commission's order did not purport to bind the defendants, they are under an independent duty to lease or sell their property to a purchaser of Jay Street's facilities. We still consider that question premature; even now the record shows no attempt to negotiate with the defendants-lessors. In any event, it seems difficult to conceive how, in the absence of a Commission order to that effect, any such duty could rest upon these defendants.

Our ruling sustaining the order granting the motion to dismiss necessarily is dispositive of so much of said order as denied the plaintiffs' application for a preliminary injunction.

Affirmed.

APPENDIX "B"

Decision of U. S. District Court, per Zavatt, D. J., dated July 10, 1959

MEMORANDUM

The instant complaint seeks a mandatory injunction requiring the defendants to carry on the interstate operations of the Jay Street Connecting Railroad, and restraining the defendants from abandoning the same or ceasing its operations unless and until the defendants are themselves authorized by a lawful order of the Interstate Commerce Commission to abandon such operations, or unless and until the defendants lease the property heretofore leased to the Jay Street Connecting Railroad to the plaintiff William Meyers. There is presently before the court a motion by the plaintiffs for a temporary injunction pending a hearing upon the merits, and a motion by the defendants to dismiss the complaint.

For the purpose of determining the motions it will be assumed, as alleged in the complaint, that the Jay Street Connecting Railroad began carrying on interstate railroad business in 1941, pursuant to a certificate granted by the Commission; that at that time two partnerships, Jay Street Terminal and Arbuckle Brothers, which held all the stock of the railroad, leased to the railroad all of the land used by it other than land lying in the streets of the City of New York over which the railroad had tracks; that prior to 1941, and from as early as 1916, Jay Street Terminal and Arbuckle Brothers themselves carried on the interstate railroad business carried on after that date by the railroad; that in 1945 the defendant Famous Realty, Inc., of which the defendants Spatt and Wohl were the sole stockholders, acquired all of the stock of the railroad and all of the land theretofore leased to the railroad by Jay Street Terminal and Arbuckle Brothers; that Famous

Realty, Inc. continued to lease the land previously mentioned to the railroad as successor to Jay Street Terminal Railroad and Arbuckle Brothers; that Famous Realty, Inc. was dissolved in 1958, and that defendants Spatt and Wohl are the sole distributees in dissolution thereof; and that said defendants are and since such dissolution have been the sole stockholders of the railroad, and the lessors of the property heretofore leased to the railroad by Jay Street Terminal and Arbuckle Brothers.

By its orders dated April 13 and May 26, 1959, the Interstate Commerce Commission certified the abandonment by the Jay Street Connecting Railroad of its entire line and carfloat and lighterage routes, subject to the following condition:

> "The applicant shall sell to any responsible person, firm, or corporation, offering within thirty days from the date of service hereof to purchase the same for continued operation of the railroad line here involved or any portion thereof, any or all of its property necessary or useful to such continued operation, including the applicant's rights and interests as lessee or tenant in respect of any such property and facilities used or useful in the operation of its line of railroad, at a price not less than the net salvage value of the properties and interests sought to be acquired, it being intended by this condition that the purchaser of the physical properties shall be substituted for and occupy the same status as the applicant now does with respect to said leasehold interests."

A three-judge statutory court in this District (Civ. No. 19821) affirmed the determination of the Commission, but specifically declined to determine whether the lessors were independently subject to a duty to lease or sell to a putative purchaser under the condition. On June 29, 1959 the

Jay Street Connecting Railroad ceased all operations, and the individual defendants have taken no steps to continue its operations.

The plaintiffs' position is that "Upon abandonment of a railroad by a lessee of property devoted to railroad use in interstate commerce, the lessors of such land are under a duty themselves to operate the railroad and failure to do so unless and until they have obtained a certificate of public convenience and necessity pursuant to Sections 1(18) to (20) of the Interstate Commerce Act is unlawful and in violation of the specific prohibition of Section 1(20) thereof which authorizes such abandonment to be enjoined by any court of competent jurisdiction." The court is not satisfied that either reason or authority supports this proposition within the context of the circumstances of the instant cause. In reaching this determination the court has considered, although it is in no way bound by, the remark of the Commission in its decision of April 13, 1959 (F.D. No. 20240) relating to the abandonment by the railroad, that:

> "* * * In our opinion, the same conclusions on the facts and law would justify our permitting the physical abandonment of the line herein by the lessor of the railroad properties, *if such lessor were subject to our jurisdiction* and therefore was obligated to continue the lessee's carrier obligations unless relieved of that requirement. We do not agree with the argument of the protestants on this point, in support of which they cite *Livestock Terminal Service Co. Abandonment*, 257 I.C.C. 1 (7), and cases therein. *In our opinion that case is not a valid precedent for requiring that Famous continue the operations of the applicant unless it decides to apply to abandon the railroad properties.*" (Emphasis supplied.)

Appendix "B"

If the defendants are under no obligation to operate the line, and assuming (because there is no allegation to the contrary in this proceeding) that the Jay Street Connecting Railroad abandoned operations pursuant to the conditions of the Commission's certificate, it is difficult to see in what way the plaintiffs are aided, in pursuing the relief now sought, by the allegation that the defendants have indicated that they are unwilling to lease to a purchaser of the railroad's properties except on unreasonable terms.

The plaintiffs' motion for a temporary injunction is denied. The defendants' motion to dismiss the complaint is granted, and the complaint is hereby dismissed. The foregoing shall constitute an order.

JOSEPH C. ZAVATT,
U. S. D. J.

APPENDIX "C"

Text of Statutes Involved

Title 49 U.S.C., § 1(18). Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Title 49, U.S.C. § 1(20). Issuance of certificate by Commission; unlawful extension or abandonment of lines. The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and,

not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

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Supreme Court of the United States

OCTOBER TERM 1959

No. 653

WILLIAM MEYERS, STANDARD BRANDS INCORPORATED, ATLANTIC GUMMED PAPER CORPORATION and WARSHAW MANUFACTURING, INC.,

Petitioners,

vs.

FAMOUS REALTY, INC., and MOSES SPATT and JOSEPH S. WOHL, individually and as Director Trustees in Dissolution thereof,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM 1959

WILLIAM MEYERS, STANDARD BRANDS INCORPORATED, ATLANTIC GUMMED PAPER CORPORATION and WARSHAW MANUFACTURING, INC., *Petitioners,* vs. FAMOUS REALTY, INC., and MOSES SPATT and JOSEPH S. WOHL, individually and as Director-Trustees in Dissolution thereof, *Respondents.*	No. 653

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Questions Presented

1. (a) Where a railroad had been operated in part upon leased land owned by respondents, and

(b) Where the respondent lessors were not and never had been carriers by railroad, and

(c) Where the lessee railroad company, pursuant to authority granted by an order of the Interstate Commerce Commission affirmed by a three-judge statutory court, had lawfully abandoned all operations,—was not the Court of Appeals correct in holding that the respondent lessors were not obligated to undertake, commence and carry on the interstate operations of the abandoned railroad?

2. Is not this action now moot?

Suggestion of Facts Rendering the Action Moot

Pursuant to authority granted by the Interstate Commerce Commission, the lessee railroad company abandoned all operations on June 29, 1959, after the Commission's decision was affirmed by a three-judge statutory court, and shortly prior to the commencement of this action (Complaint par. 14).

On December 11, 1959, forty-five days after the decision of the Court of Appeals affirming the dismissal of the complaint herein, the respondent lessors conveyed to Consolidated Edison Company the land which, during the operation of the railroad by the lessee, constituted the Bridge Street Yard in Brooklyn, New York.

The contract for the sale of this property was referred to in the proceedings before the Commission, *Jay Street Connecting Railroad Abandonment*, Finance Docket No. 20240, 307 I. C. C. 137, 154 (1959), aff'd *Jay Street Connecting Railroad* v. *United States*, 174 F. Supp. 609 (D. C., E. D. N. Y., 1959). Performance of the contract was deferred because of this litigation, and the Court of Appeals (81a) granted respondents' motion (74a-79a) for this reason to expedite the hearing of petitioners' appeal from the District Court's judgment of dismissal. Following the affirmance of this judgment, petitioners made no effort to stay the mandate of the Court of Appeals or to obtain an injunction pending application to this Court for a writ of certiorari.

The Bridge Street Yard was the focal point of the operations of the lessee, The Jay Street Connecting Railroad. The main track of that railroad extended for seven city blocks in a small area of Brooklyn lying along the East River under and on either side of the ramp of the Manhattan Bridge. The railroad had no passenger traffic. The Bridge

Street Yard was the main yard; it contained team tracks, holding tracks, classification tracks and the float bridge. All of the interstate traffic of The Jay Street Connecting Railroad was carried by water on carfloats which docked at the float bridge in the Bridge Street Yard. The disposal of this property precludes reconstitution of the facilities formerly used by the railroad in the abandoned operations.

The facts concerning this property and its sale are stated in the affidavit of Joseph S. Wohl, which has been lodged with the Clerk of this Court. Appendix A hereto is a copy of that affidavit.

Statutes Involved

The relevant sections of the Interstate Commerce Act are as follows:

> **Title 49 U. S. C. § 1(1):** "The provisions of this chapter shall apply to common carriers engaged in——
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water——
>
> From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia. * * *"
>
> **Title 49 U. S. C. § 1(2):** "The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelli-

gence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply——

* * * *

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this chapter except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district."

Title 49 U. S. C. § 1(18): "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

Title 49 U. S. C. § 1(20): "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Statement

Petitioners on June 30, 1959 filed their complaint in the District Court for the Eastern District of New York, seeking a mandatory injunction requiring respondents to carry on the interstate operations of The Jay Street Connecting Railroad until such time as respondents should themselves

be authorized by order of the Interstate Commerce Commission to abandon such operation or until such time as respondents should lease to one of the petitioners all property theretofore leased to The Jay Street Connecting Railroad. Petitioners moved for a preliminary injunction and respondents cross-moved for an order dismissing the complaint. On July 10, 1959, judgment was entered in the District Court granting respondents' cross-motion to dismiss the complaint and denying petitioners' motion for a preliminary injunction. The Court of Appeals for the Second Circuit affirmed on October 27, 1959.

The Jay Street Connecting Railroad operated under authority granted to it in 1941 by the Interstate Commerce Commission in *Jay Street Connecting Railroad Acquisition*, 244 I. C. C. 43. Pursuant to permission granted in that proceeding, The Jay Street Connecting Railroad leased land used in its operations from two partnerships, Jay Street Terminal and Arbuckle Brothers, which then owned all of its stock. (Complaint pars. 4-5.)

Thereafter, in or about 1945, respondent Famous Realty, Inc. acquired from the two partnerships all of the stock of The Jay Street Connecting Railroad and the land leased by the partnerships to that railroad. Famous Realty, Inc. was dissolved in or about 1958. Respondents Moses Spatt and Joseph S. Wohl were the sole distributees of its property and are the parties on whom petitioners seek to impose the obligation of carrying on the railroad. (Complaint pars. 6-8.)

By order dated April 13, 1959, amended May 26, 1959, the Interstate Commerce Commission issued a certificate of public convenience and necessity authorizing The Jay Street Connecting Railroad, because of the heavy and continuous losses incurred and the dwindling volume of freight movement, to abandon all of its operations. *Jay Street Connect-*

ing Railroad Abandonment, supra. In a proceeding brought by the railroad before a three judge statutory court to accelerate the effective date of the Commission's abandonment order, petitioners by cross claim challenged the validity of that order; the order in its entirety was affirmed by said court on June 26, 1959. (*Jay Street Connecting Railroad* v. *United States*, 174 F. Supp. 609 (D. C., E. D. N. Y.); Complaint pars. 9-12.) No appeal was taken.

The theory on which the present action was brought is stated in paragraph 15 of the Complaint:

> "Upon abandonment of a railroad by a lessee of property devoted to railroad use in interstate commerce, the lessors of such land are under a duty themselves to operate the railroad * * *."

The complaint fails to allege, however, that the respondents are or ever have been common carriers by railroad, or to allege any facts which would indicate that any of them ever operated in that capacity. Nor does the complaint allege that this integrated railroad ever was operated by respondents' predecessors in title. Instead the allegation (Complaint par. 5) is that respondent Famous Realty, Inc. acquired from the partnerships, Jay Street Terminal and Arbuckle Brothers, all of the land which had been leased by those partnerships to the railroad. The complaint does not allege that the land so acquired by Famous Realty, Inc. constitutes the entire railroad or that any of the respondents or their grantors ever operated this railroad. The absence of allegation in this regard is not inadvertent; it appears from the decision of the Interstate Commerce Commission (*Jay Street Connecting Railroad Abandonment, supra* 307 I. C. C. at 140, 146, 147) that a central part of the railroad was located on land purchased by Famous Realty, Inc. from one Vanneck, who is not alleged to have been a carrier.

Moreover, other portions of the railroad were situated in the public streets. (Complaint par. 5.)

It further appears from the 1941 decision of the Commission in *Jay Street Connecting Railroad Acquisition, supra*, that The Jay Street Connecting Railroad purchased the facilities formerly used in the transportation activities of the partnerships, consisting solely of marine equipment, namely two tow boats, one steel car float, two wooden car floats, and eight wooden barges. The Commission stated (244 I. C. C. 43, 44):

> "The lines operated by the applicant and the freight house are naturally component parts of one system of transportation. The purpose of the application is to obtain authority to transfer all the partnership's transportation activities to the applicant * * *".

The Commission further stated (p. 46):

> "* * * The managements of the two enterprises have concluded that it is preferable to combine their transportation activities in a duly organized railroad corporation and we think that this is in the public interest."

The Commission, upon application of that "duly organized railroad corporation", has now authorized the abandonment of all of its transportation activities. *Jay Street Connecting Railroad Abandonment, supra*, affirmed by a three-judge statutory court in *Jay Street Connecting Railroad* v. *United States, supra*. The present action would in substance circumvent that decision.

Reasons for Denying The Writ

This case presents no novel or difficult question of law. The decision below was required by the clear words of the

statute, is not in conflict with other authorities, and represents the unanimous view of the Interstate Commerce Commission, the District Court and the Court of Appeals. The decision was one of limited application depending upon the facts of this case, and this case has itself become moot.

ARGUMENT

I

THE DECISION BELOW REPRESENTS A PLAIN APPLICATION OF THE STATUTE TO THE FACTS OF THIS CASE AND IS NOT IN CONFLICT WITH OTHER AUTHORITIES

Petitioner contends that the decision of the Court of Appeals conflicts with *Smith* v. *Hoboken R. Co.*, 328 U. S. 123 (1946), *Thompson* v. *Texas, Mexican R. Co.*, 328 U. S. 134 (1946), *Hoboken Railroad, Warehouse and S. S. Connecting Co. Operation*, 257 I. C. C. 739 (1944), and *Livestock Service Terminal Abandonment of Operation*, 257 I. C. C. 1 (1944). Those decisions, pressed in the courts below, were properly considered inapplicable.

In *Smith* v. *Hoboken R. Co.*, *supra*, this Court, in proceedings for reorganization of a railroad under the Bankruptcy Act, reversed an order granting a motion by a lessor railroad to terminate a lease to the debtor railroad. In reversing the order below this Court held that authorization by the Interstate Commerce Commission was required for discontinuance of the operation by the debtor lessee.

Thompson v. *Texas, Mexican R. Co.*, *supra*, likewise involved a lessee railroad in bankruptcy. This Court in the *Smith* case (328 U. S. at 130) defined the holding of the *Thompson* case to be "that a company having trackage

rights over the lines of another must receive authorization to abandon the operations."

Applied to the facts of the instant case, the *Smith* and *Thompson* cases hold merely that it was necessary for The Jay Street Connecting Railroad to obtain the permission—which it did obtain—of the Commission to abandon operations. Neither the *Smith* nor the *Thompson* case dealt with any obligation of a non-carrier lessor.

This Court in the *Smith* case referred to *Hoboken Railroad, Warehouse and S. S. Connecting Co. Operation, supra,* wherein the Interstate Commerce Commission held that no certificate of public convenience and necessity was required to enable the lessor to resume operation upon termination of the lease. In that case, however, the lessor was a common carrier by railroad which had itself operated the line of railroad from a time prior to the enactment of the Interstate Commerce Act to the time of the making of the lease.

Similarly, in *Livestock Service Terminal Abandonment of Operations, supra*, the Commission stated that the performance by the lessor of services as a common carrier by railroad, from a time long prior to the enactment of Section 1(18) of the Interstate Commerce Act, obligated it to continue these services upon their abandonment by its lessee.

The situation considered by the Commission in the *Hoboken Railroad* and *Livestock Service* cases is to be contrasted with the present one, where the respondents never operated the railroad and never were common carriers by railroad. The undertaking by these respondents of the operation of the railroad would itself be in violation of the statute prohibiting the operation of a line of railroad without first procuring a certificate of convenience and necessity (49 U. S. C. § 1(18)).

The Interstate Commerce Commission, like the two courts below, has itself noted that the decisions relied on by petitioners are inapplicable upon the facts of the present case. The Commission said (*Jay Street Connecting Railroad Abandonment*, 307 I. C. C. 137, 164):

> "The foregoing findings inevitably warrant our concluding that the present carrier business and prospects of future operating results do not support continuation of operation of the applicant's line, and that the cost of restoring its facilities to provide safe operations would constitute an undue and unnecessary burden upon interstate commerce. In our opinion, the same conclusions on the facts and law would justify our permitting the physical abandonment of the line herein by the lessor of the railroad properties [respondents herein], if such lessor were subject to our jurisdiction and therefore obligated to continue the lessee's carrier operations, unless legally relieved of that requirement. We do not agree with the argument of the protestants [petitioners herein] on this point, in support of which they cite *Livestock Terminal Service Co. Abandonment*, 257 I. C. C. 1(7), and cases therein. In our opinion that case is not a valid precedent for requiring that Famous [respondents herein] continue the operations of the applicant unless it decides to apply to abandon the railroad properties."

Although petitioners contended (Complaint par. 15) that respondents were obligated, by virtue of their ownership of land on which the railroad formerly operated, to undertake and carry on the operation of the railroad, petitioners now seem to urge that this obligation extends only to that part of the operation which before 1941 was conducted by the partnerships. Thus, petitioners state (Petition p. 8):

> "If that operation is resumed, the local handling of shipments between the grantor's freight station and the neighboring industrial plants can be effected in many ways which should not be the concern of the courts in this case."

That operation, however, would involve only the transportation of property by water between the Brooklyn waterfront and the terminal points of trunk line railroads. As the Court of Appeals held (Petition p. 19), it would not involve the operation of any line of railroad. The service in question, therefore, would be excepted from the operation of the Interstate Commerce Act by 49 U. S. C. §§ 1 (1) (a), 1 (2) (c) and 1 (18). Under those sections duties are imposed only on "carriers by railroad" (not upon lessors of land to railroads), and transportation of property solely by water is excepted from the coverage of the Act; and the only operation which may not be undertaken or abandoned without Commission approval is the operation by a "carrier by railroad" of "all or any portion of a line of railroad". *Lucking v. Detroit Nav. Co.*, 265 U. S. 346 (1924). Since the lessors herein are not and never have been carriers by railroad the complaint fails to state a claim upon which relief can be granted.

In the absence of any statutory duty or other ground for any relief, the demand by petitioners for a mandatory injunction requiring respondents to reconstitute all or any part of the lawfully abandoned facilities of The Jay Street Connecting Railroad, and to operate them at a heavy loss pending any further application for leave to abandon, was so lacking in equity as to call for prompt dismissal of the complaint. If the asserted unwillingness of respondents to lease or sell the properties to petitioners were material, as in the absence of any obligation upon respondents it clearly is not, petitioners' counsel conceded in argument, as the

opinion of the court below reflects (Petition p. 23), that petitioners in fact never even made an attempt to negotiate with respondents for the use of the premises formerly leased to the railroad. The inequity of petitioners' action could not be more clear, and review by this Court is unnecessary.

II.

THE ACTION IS MOOT

This railroad had already been lawfully abandoned by its operator when this action was commenced (Complaint par. 14).

Following the decision of the Court of Appeals affirming the dismissal of the complaint herein, petitioners did not seek any injunction pending application for certiorari. Accordingly respondents, as they were free to do, sold and conveyed to Consolidated Edison Company property which includes the entire Bridge Street Yard, where The Jay Street Connecting Railroad had its only float bridge and where it conducted the docking operations essential to all its operations (Appendix A, *infra*).

This conveyance was not made without warning to petitioners. They knew of the existence of a contract for the sale of the property from a time prior to the decision of the Commission authorizing abandonment. Respondents moved to expedite the appeal herein (which was not taken until 28 days after the entry of the judgment of the District Court) precisely upon the ground that the pendency of that appeal was interfering with this sale (74a-79a). The Court of Appeals granted this motion on August 28, 1959 (81a). Thereafter, following the affirmance by the Court of Appeals of the judgment dismissing the complaint, petitioners made

no effort to restrain the sale. Instead they waited 87 days before filing the petition for certiorari herein.

The disposal of the property, 45 days after the affirmance below, has as a result of petitioners' own neglect and delay rendered the action moot. E.g. *Heitmuller* v. *Stokes*, 256 U. S. 359 (1921); *Chesapeake Western Ry.* v. *Jardine*, 8 F. 2d 794 (App. D. C., 1925), cert. den. *sub nom. Town of Bridgewater* v. *Jardine*, 270 U. S. 653 (1926); *Fink* v. *Continental Foundry & Machine Co.*, 240 F. 2d 369 (7th Cir., 1957), cert. den. 354 U. S. 938 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
Counsel for Respondents
120 Broadway,
New York 5, N. Y.

SIMPSON THACHER & BARTLETT
Of Counsel

February, 1960.

APPENDIX A

Affidavit Suggesting Mootness

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOSEPH S. WOHL, being duly sworn, deposes and says:

1. In 1945 respondent Famous Realty, Inc. became the owner of land a part of which was occupied under lease by The Jay Street Connecting Railroad and was used by the latter company for railroad operations. Upon the dissolution of Famous Realty, Inc. in 1958, Dr. Moses Spatt and I became the distributees of its property.

2. On or about December 11, 1959, Dr. Spatt and I conveyed to Consolidated Edison Company of New York, Inc. certain of that land, together with the buildings thereon, described as follows:

> "ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York, bounded and described as follows:
>
> BEGINNING at a point on the northerly side of John Street distant 160 feet westerly from the corner formed by the intersection of the northerly side of John Street and the westerly side of Gold Street; running thence northerly parallel with Gold Street 523.79 feet to the Pierhead Line established in 1857; thence westerly along said pierhead line 926.90 feet; thence southerly along the easterly side of Jay Street if extended, 412.47 feet to the northerly side of

John Street; thence easterly along the northerly side of John Street 890.83 feet to the point or place of beginning."

3. The land so conveyed included all of the Bridge Street Yard, formerly occupied by The Jay Street Connecting Railroad. This yard was the focal point of all the traffic formerly carried by The Jay Street Connecting Railroad. It was at this Yard that all the car floats were docked. It was here that all of the incoming freight cars were unloaded from the floats and sent along the Brooklyn waterfront, and it was here that all of the outgoing freight cars were assembled and loaded on car floats for transportation across New York harbor.

4. This sale was made pursuant to a contract entered into on or about July 29, 1958 between Consolidated Edison Company of New York, Inc. and Dr. Spatt and me.

5. In accordance with this contract of sale, certain of the buildings in the Bridge Street Yard and small portions of land adjacent to these buildings which were not immediately needed by Consolidated Edison Company were leased back by it to Dr. Spatt and me through a mesne grantee. None of the property in our possession as lessees under this lease encompasses water frontage, and we are not possessed as such lessees, or otherwise, of the premises where the only docking facilities (a float bridge) of The Jay Street Connecting Railroad were located. Another property owned by us and fronting on the East River was also formerly leased in part to The Jay Street Connecting Railroad and was used by it as a yard for team tracks, which sole function of this yard required no water frontage.

Appendix A

There is not now, and during the time of operation of the railroad there was not, at this property any float bridge or other docking facility for railroad cars.

JOSEPH S. WOHL

Sworn to before me this
17th day of February, 1960.

MILTON LOEWE
NOTARY PUBLIC, State of New York
No. 30-7584125
Qualified in Nassau County
Commission Expires March 30, 1960

(NOTARIAL SEAL)

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Office-Supreme Court, U.S.
FILED
FEB 25 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM 1959

No. 653

WILLIAM MEYERS, STANDARD BRANDS INCORPORATED, ATLANTIC GUMMED PAPER CORPORATION and WARSHAW MANUFACTURING, INC.,

Petitioners,

vs.

FAMOUS REALTY, INC., and MOSES SPATT and JOSEPH S. WOHL, individually and as Director-Trustees in Dissolution thereof,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF

RICHARD SWAN BUELL,
Counsel for Petitioners,
40 Wall Street,
New York 5, N. Y.

BUELL CLIFTON & TURNER;
ANDREW M. CALAMARI,
Of Counsel.

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This reply is necessary because (1) respondents' brief contains misstatements of facts of record on the basis of which, respondents contend—and could not otherwise—that no conflict exists between the decision below and the decisions cited in the Petition, and (2) respondents raise a new issue, namely, mootness.

Respondents state (pp. 7 and 10) that the complaint contains no allegation that respondents or their grantors are

or were carriers by railroad or that either ever operated the railroad as to which the injunction is sought. However, paragraph "5" of the complaint alleges:

> "* * * Prior to 1941, and from as early as about 1916 Jay Street Terminal and Arbuckle Brothers [the two partnerships which are respondents' grantors] had themselves carried on the interstate railroad business carried on after that date by Jay Street Connecting Railroad."

This is a clear allegation both that the grantors were carriers by railroad and that they operated the railroad in question. In addition, it is necessarily an allegation that the grantors were carriers subject to the Interstate Commerce Act, since it is established that a carrier which began operations prior to the enactment of Sections 1 (18-20) of the Act "in the performance of the service for many years, * * * incurred the relationship and duty to the public of a common carrier by railroad subject to the Act" *Livestock Terminal Company Abandonment of Operations*, 257 I.C.C. 1, 7 (1944).

Respondents (departing from the allegations of the complaint) assert further that the part of the operation conducted by the grantors prior to 1941 was only a water operation. At best from respondents' point of view that would be a matter for proof at the trial. The facts in 244 I.C.C. 43, however, indicate that such operation included, in addition to water transportation, the operation of various tracks in and about the float bridge and freight station and the operation of the freight station, which necessarily required the transporting of cars between the pierheads and such station. Whether it owned or leased its motive power for such transporting is, of course, immaterial.

Respondents quote from the Commission's report of April 13, 1959, in *Jay Street Connecting Railroad Abandon-*

ment, 307 I.C.C. 137, 164 to the effect that *Livestock Terminal Co. Abandonment*, 257 I.C.C. 1 is not a valid precedent for requiring the lessors [respondents herein] to continue the railroad's operation. Taken at its face value, this quote emphasizes the conflict asserted by petitioners to exist between the *Livestock* case and the decision below. However, respondents neglect to inform the Court of an additional significant fact regarding this quote. In said report the Commission also denied the request of protestants [petitioners herein] to condition any authority to abandon upon first offering to sell the railroad for continued operation as a going concern at its salvage value and with the same lease rights. The Commission supported this denial by asserting its lack of jurisdiction over the lessors (307 I.C.C. 137). Subsequently, on petition for reconsideration, in which petitioners urged the existence of such jurisdiction, the Commission reversed itself on this point and, without further report, by order dated May 26, 1959 imposed the requested condition (see *Jay Street Connecting Railroad* v. *U. S.*, 174 F. Supp. 609, 613 (E.D.N.Y., 1959). This condition is quoted by the Court below. (Petitioners' Appendix, p. 14). Cf. *Livestock* decision, page 7.

Respondents' final reason for urging denial of the Petition is the alleged sale to Consolidated Edison Company, since the decision below, of *part* of the land and appurtenances formerly operated by respondents' grantors and thereafter leased by respondents to the railroad. Obviously, however, if the principle asserted to conflict with the decision below is upheld, a transfer to a grantee with knowledge cannot avoid the obligations imposed by the principle—a fact which, the Court below itself recognized (Petitioners' Appendix, pp. 18). Furthermore, substantive rights cannot be changed by timing the transfer to occur pending appeal. *Mendez* v. *Bowie*, 118 F. 2d 435, 440 (1 Cir. 1941). Neither does timing of the transfer raise any procedural difficulty since Rule 25 (c) of the Rules of Civil Procedure offers

ample protection should it develop either before or during the trial that the ownership of the part of the property allegedly sold is material to a decision at the trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD SWAN BUELL,
Counsel for Petitioners.

BUELL CLIFTON & TURNER,
ANDREW M. CALAMARI,
Of Counsel.